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No. 84-527

In the Supreme Court of the United States

OCTOBER TERM, 1984

SECURITY BANK & TRUST COMPANY OF LAWTON, OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a bank that maintained an $80,000 line of credit for a government contractor who had assigned to petitioner the proceeds of his contract, may recover damages from the United States for the government's failure to inform petitioner of the early termination of the contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 731 F.2d 861. The opinion of the Claims Court (Pet. App. 23a-48a) is reported at 2 Cl. Ct. 646.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1984. A petition for rehearing was denied on May 30, 1984 (Pet. App. 22a). On August 27, 1984, the Chief Justice granted an extension of time to and including September 28, 1984, within which to file a petition for a writ of certiorari. The petition for a writ of certiorari was filed on September 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of the Army entered into a contract for the provision of food services at Fort Sill, Oklahoma, with the Small Business Administration (SBA) under the SBA's program setting aside certain government contracts for disadvantaged contractors (see 15 U.S.C. 637(a)). On October 1, 1976, the SBA entered into a subcontract with the Bluford Services Company, which was owned and operated by Foxie M. Bluford, for performance of the Fort Sill food service contract. Pet. App. 2a. The contract originally expired on September 30, 1977, but it was extended three times, with the final extension terminating on September 30, 1978 (*ibid.*).

Bluford had difficulties meeting his payroll, and therefore obtained an $80,000 line of credit from petitioner (Pet. App. 2a-3a). As security for this line of credit, Bluford assigned to petitioner the proceeds of his subcontract (*id.* at 3a). Thereafter, Bluford would go to the bank twice a month and ask Perman Henderson, vice president of petitioner and a loan officer, for an $80,000 loan (*id.* at 3a-4a). Checks due under the subcontract were made payable to Bluford Services in care of petitioner and were sent by the Army directly to petitioner (*id.* at 4a). When a check was received by petitioner, Henderson would pay off any outstanding loan and deposit the excess in Bluford's payroll account (*ibid.*). The court below noted that "Bluford was supposed to pay off any pending loan before receiving a new one" (*ibid.*).

When the contract was extended for the third time, through September 30, 1978, it was modified to provide that it could be terminated for the convenience of the government (Pet. App. 4a). In a March 10, 1978 letter, Robert K. Ball, the Acting District Director of the SBA, informed Henderson of this extension and stated that if the contract was terminated prior to its expiration date, "this

office will immediately notify you of the termination date" (*id.* at 5a). The Army terminated the contract effective August 31, 1978, but neither the SBA nor Bluford informed petitioner of the termination (*id.* at 5a-6a).

On August 30, 1978, the Army awarded a new, one-month contract directly to Bluford, without using the SBA as an intermediary (Pet. App. 6a). On September 8, 1978, Bluford obtained another loan of $80,000 from petitioner, which did not know of the termination of the original contract or that the new loan would be used to help Bluford perform a new contract (*ibid.*). On September 22, 1978, Bluford borrowed another $80,000 from petitioner, even though the September 8 loan had not been repaid (*ibid.*). According to the court of appeals, "[t]his was contrary to the arrangement he had with the bank and also different from the custom and practice they had followed in the past * * *. Furthermore, this second $80,000 loan was in excess of the line of credit of $80,000 the bank had approved for him" (*ibid.*).

Three days after he obtained the second $80,000 loan, Bluford went to petitioner with a check for $110,000 that he had received from Fort Sill (Pet. App. 6a). For the first time since the execution of the assignment, the Army had sent a check to Bluford instead of petitioner and had made it payable solely to Bluford rather than to Bluford in care of petitioner (Pet. App. 6a-7a). Nevertheless, Henderson made no inquiry about the sudden change in the method of drawing and delivering the Army's payments under the contract (*ibid.*). Rather, Henderson simply cashed the check, applied $80,000 of the amount to the September 8 loan, and deposited the remaining $30,000 in Bluford's payroll account (*id.* at 7a). On October 10, 1978, Fort Sill delivered another check to Bluford, this time for $85,378.84, the last payment under the one-month contract (*ibid.*). Bluford purchased two cashier's checks, one for $50,000,

the other for $35,000, and deposited the $50,000 check in his payroll account at petitioner (*id.* at 7a-8a). Petitioner did not apply any of this $50,000 to the September 22 loan (*id.* at 8a). On October 17, 1978, after Henderson learned that Bluford had been injured in an automobile accident, he called the Army to find out if Bluford had any more payments forthcoming (*ibid.*). Henderson was then informed of the cancellation of the original contract and of the one-month direct contract (*ibid.*).

2. Petitioner brought suit against Bluford in state court on the unpaid $80,000 loan, and recovered $5,800 as a result of attaching and selling some of Bluford's equipment (Pet. App. 8a). However, petitioner applied these proceeds to another outstanding loan to Bluford, not to the unpaid $80,000 loan. Instead, petitioner sought to recover the full $80,000 from the government by filing this action in the Claims Court. Petitioner contended that the March 10, 1978 letter from the SBA to Henderson created an implied-in-fact contract obligating the SBA to notify petitioner of the termination of its contract with Bluford, and that the SBA breached the contract by failing to give the termination notice. Pet. App. 8a-9a.

The Claims Court dismissed the complaint after trial (Pet. App. 23a-48a). The court found that the March 10 letter constituted an agreement between the SBA and petitioner in which the SBA made a promise in exchange for petitioner's performance, *i.e.*, its continued making of regular loans to Bluford that enabled him to perform his food service contract (*id.* at 30a-31a). The court found that the SBA's promise was its assurance that petitioner would receive repayment for these loans (*id.* at 31a). It held that petitioner could not recover the $80,000 it sought under this agreement, because the unpaid loan did not relate to the SBA subcontract and therefore was outside the scope of the March 10 letter (Pet. App. 31a-32a).

3. The court of appeals affirmed (Pet. App. 1a-18a). It concluded that petitioner could not recover for breach of the implied-in-fact contract allegedly created by the March 10, 1978 letter from the SBA. First, the court held that petitioner received every payment made under the contract assigned to petitioner and that these payments constituted the full extent of the government's liability under the assignment (*id.* at 12a). Second, the court found that the government was not liable because the unpaid September 22, 1978 loan was used by Bluford for the direct one-month contract and was thus outside the scope of the March 10, 1978 letter from the SBA, which dealt only with the original contract (*id.* at 12a-13a). Third, the court found that the unpaid September 22 loan was beyond the $80,000 line of credit, because when it was made Bluford already owed $80,000. The court stated that "it appears that the September 22, 1978, loan was not only unauthorized but also was contrary to the tacit understanding between the bank, the SBA and Mr. Bluford that no $80,000 loan would be made until and unless the previous loan in that amount had first been paid" (*id.* at 13a). The court declined to hold the government responsible "for such negligent management by the bank of its financial affairs" (*ibid.*). Finally, the court found that petitioner's loss "was the result of the bank's own mismanagement and negligence" (*ibid.*) because Henderson "was at least put on inquiry to find out" why Bluford suddenly began to receive payment directly from the Army instead of through the bank (*id.* at 14a-15a). The court observed that the $30,000 left over from the $110,000 check that Henderson cashed, plus the $50,000 cashier's check that Bluford deposited in his payroll account from the [illegible]id payment under the one-month contract, would have fully covered the September 22 loan (*ibid.*).

The court of appeals also rejected petitioner's claims that it was entitled to recover for the government's alleged violation of the Assignment of Claims Act of 1940, 31 U.S.C.

3727 and 41 U.S.C. 15, and an Armed Forces Procurement Regulation, 32 C.F.R. 8-203(b). The court held that the Assignment of Claims Act of 1940 requires only that the government pay the assignee all amounts payable under the assigned contract, and that was done here (Pet. App. 16a-17a). Moreover, the Armed Services Procurement Regulation, which petitioner alleges the government breached by its failure to give notice of termination of the contract, creates no cause of action for damages, since it does not by its terms require the payment of money (*id.* at 17a).

Judge Bennett dissented, asserting that "to me this is a clear and classic case of a contract implied in fact that has been breached by the government" (Pet. App. 18a).

ARGUMENT

The court of appeals correctly rejected each of petitioner's theories for recovery of damages against the United States. Moreover, the decision below does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

1. Petitioner's principal argument in this Court (Pet. 10-12) is that the Army's failure to notify it of the termination of the original SBA contract with Bluford violated a provision of the Armed Services Procurement Regulations which provides that "[s]imultaneously with issuance of the termination notice to the contractor a copy shall be sent to the contract administration office and to any known assignee, guarantor, or surety of the contractor." 32 C.F.R. 8-203(b). As petitioner concedes (Pet. 11), this provision "was not contained in or incorporated by reference into the" contract between Bluford and the SBA. Moreover, even assuming arguendo that the regulation had been incorporated into Bluford's contract and that it was violated by the Army, petitioner cannot recover damages on a breach of contract theory. As an assignee, petitioner "did not have

privity of contract or any contractual relationship with the Government" (*Produce Factors Corp.* v. *United States*, 467 F.2d 1343, 1347 (Ct. Cl. 1972)). Therefore, it is limited to the rights conferred by the Assignment of Claims Act of 1940, and cannot maintain an action for breach of the underlying contract (*ibid.*).[1]

Petitioner similarly cannot base a right to recover damages upon the regulation itself.[2] As the court below explained (Pet. App. 17a), because the regulation does not by its terms require the payment of money to an assignee, no cause of action will lie for damages under the Tucker Act. *United States* v. *Testan*, 424 U.S. 392, 401-402 (1976); *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1008 (Ct. Cl. 1967).[3]

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[1]The cases cited by petitioner (Pet. 11) all concern the question whether a particular regulation was incorporated into a contract. See *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977) (antidiscrimination clause incorporated by operation of law); *G.L. Christian & Assoc.* v. *United States*, 312 F.2d 418 (Ct. Cl. 1963), cert. denied, 382 U.S. 821 (1965) (termination clause incorporated into contract by force of law); *General Electric Co.* v. *Moretz*, 270 F.2d 780 (4th Cir. 1959) (shipping regulations deemed to be part of contract). None of these decisions holds that a nonparty to a contract, such as petitioner, is entitled to recover damages for the violation of a regulation incorporated into the contract.

[2]The cases upon which petitioner relies (Pet. 9, 14) stand only for the unexceptional proposition that the government must conform to its regulations. They do not hold that the violation of a regulation creates a cause of action for damages. In each case there was an independent source for the plaintiff's cause of action. See *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (judicial review of denial of social security benefits); *Service* v. *Dulles*, 354 U.S. 363 (1957) (wrongful discharge action); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (habeas corpus action).

[3]Although the dissenting judge contended (Pet. App. 19a-20a) that the regulation gave rise to an implied contract between the government and the assignee, this Court held in *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 738-740 (1982), that a contract could

2. Petitioner also argues that under the Assignment of Claims Act of 1940, "the assignee of government contract rights is entitled to certain governmental protection of its interest" (Pet. 10, 12-13) and that it therefore is entitled to damages under the Act. The flaw in this argument is that the statute provides no protection for the interest that petitioner asserts. The court of appeals correctly stated (Pet. App. 17a) that "[a]ll that this Act requires of the government is that it pay all amounts to the assignee that are payable under the assigned contract which have not already been paid." See also *Produce Factors Corp.* v. *United States*, 467 F.2d at 1349. All payments that Bluford assigned to petitioner were in fact made. The payment under the one-month special contract was not made to petitioner because that contract did not contain an assignment to petitioner.[4]

3. Petitioner also briefly reiterates (Pet. 13-14) what was its chief argument below: that the March 10, 1978 letter from the SBA to petitioner created an implied-in-fact contract and that the government's failure to notify petitioner of the termination of the contract with Bluford constituted a breach of the implied contract. The determination of the Claims Court (Pet. App. 31a-32a) that petitioner cannot recover on this ground was upheld by the court of appeals

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not be implied solely from the existence of regulations. The cases cited by the dissent (Pet. App. 20a) are inapposite because they all involved a claim of an implied contract based upon negotiations between the government and the plaintiff.

[4]The two cases cited by petitioner (Pet. 12-13) concern instances in which the government was held liable because it violated rights specifically granted to assignees by the statute. See *Mercantile National Bank* v. *United States*, 280 F.2d 832 (Ct. Cl. 1960) (government improperly offset earlier overpayments against payments to assignee); *Central National Bank* v. *United States*, 91 F. Supp. 738 (Ct. Cl. 1950) (government ignored valid assignment and made payments to contractor). They do not help petitioner because the Act does not grant the right to notice asserted by petitioner.

(*id.* at 11a-15a). This fact-bound issue is not appropriate for review by this Court.

In addition, the lower courts' determinations are correct. For example, the court of appeals properly found (Pet. App. 13a-15a) that petitioner's negligence, not the absence of notice, was the cause of its loss. Within days of making the second loan — in violation of the terms of the line of credit and thus in violation of any agreement that existed with the SBA — petitioner's loan officer cashed a check made payable to Bluford alone and sent by the Army to Bluford, not to petitioner. Petitioner should have realized from this change in the method of payment that a change in petitioner's status had occurred. If petitioner had made an inquiry at this point, it would have been able to recover the full amount of the unpaid loan (*id.* at 15a). Petitioner's failure to act was negligent, and that negligence alone is fatal to its claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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